MOTION FILED
JUN 26 1981

No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ROSS D. DAVIS
DAVIS SIMPICH & SIENA
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 833-3640

Counsel for National League of Cities

Of Counsel:

HOWARD W. FOGT, JR.
JAY N. VARON
CATHERINE B. KLARFELD
FOLEY, LARDNER, HOLLABAUGH & JACOBS
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 862-5300

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the delegation to a city of a State's complete authority to regulate and govern matters of local concern does not confer to the city, absent some contrary indication of State intent, the same immunity from antitrust attack that the State would possess if it exercised such authority rather than delegated it to the city?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

The National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

1. The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. This case calls upon the Court to clarify the circumstances under which a city's governmental acts will be insulated from antitrust attack under the "state action doctrine." The Court's answer is of enormous consequence to cities as well as states and could threaten the sovereignty of states and their instrumen-

talities, generate serious impediments to the abilities of states and cities to govern effectively and otherwise undermine the efficacy of the federal system of government.

3. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the workings of municipal governments and the consequences which its decision will have upon such entities. NLC believes that its views can assist the Court in further defining or reformulating a test for municipal antitrust immunity which will be meaningful and workable within the practical context of local and state government operations.

4. NLC seeks to have the Court appreciate the correspondence between the governmental acts of the City of Boulder that are at issue in this case and the basic and traditional authorities and activities of all municipal governments. If such activities as zoning, licensing and franchising are now ruled to be subject to antitrust scrutiny, NLC believes that the capacity of municipal governments to perform their traditional roles in the federal system will be seriously impaired.

5. NLC also believes it important for the Court to appreciate the significance of the breadth of the home rule authority which is at issue here and the continuing dispute between state and local government administrators throughout the Country with respect to this charter of local self-government. The shortsighted and exaggerated fears expressed by the state *amici* should be assessed in this context. It is the position of the NLC that where, as in Colorado, the State Constitution provides for and expressly favors local self-government and broad home rule, such policies merit the deference of this Court and should not be rescinded by unwarranted and unmanageable restrictions upon their use at the behest of the state attorneys general. If the states and their people truly desire to place municipal governments under the strictures of the antitrust laws, they can do so by amendments to appropriate legislation or constitutional provisions.

6. Finally, NLC urges that any principles that the Court articulates that could subject municipal acts to federal antitrust scrutiny must be consistent with the Constitutional reach of the Commerce Clause and be sufficiently clear and comprehensible that municipalities would not unwittingly subject their citizens to

the tremendous and possibly bankrupting expense of treble damage awards which could flow automatically from inadvertent antitrust violations.

7. Accordingly, NLC seeks to explain its views to this Court and to assist in determining the issues presented by this case.

8. Consent has been sought from the parties to the filing of a brief *amicus curiae*. Consent was refused by counsel for Community Communications Company, Inc.

Respectfully submitted,

ROSS D. DAVIS
DAVIS SIMPICH & SIENA
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 833-3640
Counsel for National League of Cities

Of Counsel:
HOWARD W. FOGT, JR.
JAY N. VARON
CATHERINE B. KLARFELD
FOLEY, LARDNER, HOLLABAUGH & JACOBS
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 862-5300

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE ..... i, 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

COLORADO'S DELEGATION TO THE CITY OF BOULDER OF COMPLETE AUTHORITY TO GOVERN AND REGULATE MATTERS OF LOCAL CONCERN CONFERRED ON BOULDER THE SAME IMMUNITY FROM ANTITRUST ATTACK THAT THE STATE WOULD HAVE POSSESSED IF IT HAD IMPOSED THE REGULATIONS IN QUESTION RATHER THAN DELEGATING THAT POWER TO BOULDER

I. The Tenth Circuit's Holding That Boulder's Ordinance Imposing A Temporary Moratorium On Cable Television Construction Was Not Subject To Antitrust Attack Under The State Action Doctrine Is Consistent With The *City Of Lafayette* Decision And Other Applicable Precedent 7

A. The Purpose Of The Sherman Act Was To Prohibit Individual And Corporate Efforts To Restrain Trade And To Monopolize; It Did Not Undertake To Prohibit Restraints Imposed As A Result Of State Action 7

B. In *City Of Lafayette*, The Court Held That Under The State Action Doctrine An Entity's Status As A Municipality Did Not Automatically Entitle It To The Same Protection As A State But That An Adequate State Mandate For The Anticompetitive Activities Of A Municipality Existed When Its Authority To Operate In Particular Areas Contemplated The Kind Of Anticompetitive Action Which Was Taken 8

C. The Tenth Circuit's Decision Accords With The *City of Lafayette* Decision And Other Supreme Court Precedent 10

Table of Contents Continued

PAGE

1. Colorado's Grant Of Total Self-Government To Its Home Rule Cities With Respect To Local And Municipal Matters Provides An Adequate State Mandate For Any Local And Municipal Activities That May Be Anticompetitive 11

2. This Is A Different Case Than *City Of Lafayette*, And the Concerns Which That Decision Articulated Are Not At Issue Here 13

II. Petitioner's Interpretation Of *City Of Lafayette* Would Critically Impair The Ability Of Municipalities To Govern And Should Be Rejected 16

A. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And The State *Amici* Are Inconsistent With The Concept Of Home Rule And Represent An Improper Effort By Those Parties To Repeal The Constitutional Grant Of Self-Government To Municipalities..... 16

B. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And State *Amici* Unreasonably Impinge Upon The Sovereignty Of States And Their Cities And Threaten The Effective Operation of State and Local Governments 18

III. The Tenth Circuit's Decision Strikes The Proper Balance Between Constitutional Principles Of Federalism And The Congressional Desire To Establish Competition As The Guiding Principle Governing Commerce By Neither Impairing The Abilities Of States And Cities To Allocate And Exercise Government Power Nor Providing Those Entities With A License To Violate The Antitrust Laws With Impunity..... 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: PAGE

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 4, 11, 12, 27

Bluechip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1965) 17

California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 5, 6, 27

Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 12, 25

Cedar-Riverside Associates, Inc. v. *United States*, 459 F. Supp. 1290 (D. Minn. 1978) 10

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) ..... *passim*

Community Communications Co. v. *City of Boulder*, 485 F. Supp. 1035 (D. Colo. 1980); 630 F.2d 704 (10th Cir. 1980) 2, 3, 4, 10, 13

Craig v. *Boren*, 429 U.S. 190 (1976) 28

Fergerson v. *Sherupa*, 372 U.S. 726, (1963) 22

Fry v. *United States*, 421 U.S. 542 (1975) 23

Gen. Commun. Eng. v. *Motorola Commun. & Electronics*, 421 F. Supp. 274 (N.D. Cal. 1976) 17, 18

Georgia v. *Evans*, 316 U.S. 159 (1942) 25

Glenwillow Landfill v. *City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979) 13

Goldfarb v. *Virginia State Bar*, 421 U.S. 733 (1975) 12

Holt Civic Club v. *City of Tuscaloosa*, 439 U.S. 60 (1978) 18, 19

Indian Towing Co., Inc. v. *United States*, 350 U.S. 61 (1955) 28

Jordan v. *Mills*, 473 F. Supp. 13 (E.D. Mich. 1979) 25

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 20

Lowenstein v. *Evans*, 69 F. Supp. 908 (D.S.C. 1895) 7

Table of Authorities Continued

CASES:	PAGE
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	22
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	5, 22, 23, 24
Olsen v. *Smith*, 195 U.S. 332 (1904)	7
Parker v. *Brown*, 317 U.S. 341 (1943)	*passim*
Reed v. *Reed*, 404 U.S. 71 (1971)	28
Reeves, Inc. v. *Stake*, 447 U.S. 429 (1980)	19, 26, 27
Reid v. *University of Minnesota*, 107 F. Supp. 439 (N.D. Ohio 1952)	26
Sailors v. *Board of Education*, 387 U.S. 105 (1967)	19
Schwegman Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	25
Union Pacific R.R. v. *United States*, 313 U.S. 450 (1941)	25
United States v. *Colgate & Co.*, 250 U.S. 300 (1919)	26

CONSTITUTIONAL PROVISIONS, STATUTES & ORDINANCES:	
Boulder, Colo., Ordinance No. 2846	2
Boulder, Colo., Ordinance No. 4472	1
Boulder, Colo., Ordinance No. 4473	1
Colo. Const. art. II, §11	2
Colo. Const. art. XX, §6	1
Fair Labor Standards Act, 29 U.S.C. §206 (1976)	22
United States Const. art. I, §8 (Commerce Clause)	ii, 23, 24, 28
Tenth Amendment	5, 23

Table of Authorities Continued

OTHER AUTHORITIES: PAGE

Bureau of the Census, U.S. Department of Commerce, GF 79 No. 4, *City Government Finances in 1978-79* (1980) 19, 20

Columbus City Codes 20

County Supervisors Association of California, *Catalog of Public Services and Functions* (1974) 20

Economic Report of the President 315 (1981) 20

Freilich, Growock & Ungar, "1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs," 10 Urb. L. 573 (1978) 22

L. Gulick, *The Metropolitan Problem and American Ideas* 45 (1962) 18

Handler, "The Current Attack on the *Parker* v. *Brown* State Action Doctrine," 76 Colum. L. Rev. 1 (1976) 15

J. Mileur, "Municipal Home Rule in the United States," in *Home Rule* 9 (E. Gere & M. Curran ed. 1970) ... 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE

The interests of the National League of Cities are set out in the foregoing Motion.

STATEMENT OF THE CASE

The City of Boulder is one of several home rule cities to which the Colorado Constitution "grants the full right of self-government in both local and municipal matters" such that local and municipal ordinances are deemed to supersede contrary state statutes.[1] This case involves an antitrust challenge of certain ordinances[2] which the City of Boulder enacted pursuant to its home rule authority in December, 1979 and which imposed a 90-day

[1] Colorado Constitution, art. XX, sec. 6.

[2] City Ordinances Nos. 4472 and 4473, reprinted in the Appendix to the Petition for Certiorari ("App. Pet.") at A-55 to A-65.

moratorium on new cable television construction by the petitioner within the city limits.[3]

The moratorium that petitioner challenges resulted from a five-month study initiated by the City in July, 1979 to explore the best means of achieving competition in the Boulder cable television market.[4] This study was prompted by petitioner's announcement of its intention to expand its cable television system in Boulder and by one of petitioner's competitors filing an application for a permit to build its own cable television system.[5] After numerous City Council meetings at which these events were reviewed,[6] the Council concluded that competition could not be achieved simply by issuing further permits to other cable television companies. Rather, the Council found that in light of petitioner's presence in the market and substantial headstart in "wiring" and developing its system, potential competitors would not enter the Boulder cable television market unless further construction was halted.[7] Based upon this conclusion and the Council's belief that Boulder's cable television market resembled a "natural monopoly,"[8] the City decided to maximize competition by halting the expansion of petitioner's system and soliciting proposals from other cable television operators to compete with peti-

[3] Petitioner was then the only cable television company operating in Boulder, although its operating permit was non-exclusive and revocable by the City. City Ordinances No. 2846 (App. G to Colo. *amicus curiae* br. for cert.); Colorado Constitution, art. II, sec. 11.

[4] *See, e.g.,* Boulder Ex. X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

[5] *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1036 (D. Colo. 1980).

[6] *See, e.g.,* Boulder Ex.X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

[7] *Id.*

[8] *See, e.g.,* Boulder Ex. X at 23.

tioner.[9] This decision, in effect, to franchise only the best of several potential cable television operators was a sound governmental regulation and was no different than thousands of other licensing and franchising decisions which cities have traditionally made and routinely make on a daily basis.[10] Moreover, it was in no way tainted by proprietary interests since Boulder was not itself in the business of providing cable television services, and the City's decision was not designed to, nor did it actually provide, Boulder with any greater revenues than the regulatory options urged by petitioner.[11]

Nevertheless, petitioner chose to challenge the City's ordinances under the federal antitrust laws and filed this case in Federal District court on January 15, 1980 seeking treble damages and injunctive relief against the City. On March 15, 1980, the District Court held that the City's conduct had imposed a "restraint of trade" and issued a preliminary injunction enjoining the City "from taking any unilateral action to restrict, limit or revoke the authority of [petitioner] to conduct its cable television business. . . ." [12] On May 28, 1980, the Court of Appeals for the Tenth Circuit reversed the District Court's issuance of the preliminary injunction, finding that the federal antitrust laws

---

[9] Shortly after adopting the moratorium Ordinances, the City began its attempts to induce competitors to come into the Boulder cable T.V. market. On January 11, 1980 the City mailed draft applications for cable permits to over 50 cable operators in the United States. (Westdyke, March 4 Tr. 43). The City also placed advertisements in the *Wall Street Journal* (Varnes, March 6 Tr. 20). Only three cable operators (other than petitioner) responded to the City's solicitation. Each of the operators, including BCC, indicated, subsequent to filing its proposal, that it would not enter the market if petitioner proceeded to "wire" the entire City. (Boulder Ex. 1-2d at 1089-1102, 1110-11).

[10] *See, e.g.,* notes 19-21 *infra* and accompanying text.

[11] *See Community Communications Co.* v. *City of Boulder,* 630 F.2d 704 (10th Cir. 1980) (hereinafter cited as 630 F.2d at 704).

[12] *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1036 and 1041 (D. Colo. 1980) (hereinafter cited as 485 F. Supp. at 1036 and 1041).

were not applicable to the City's conduct under the "state action" doctrine enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny.[13] The correctness of the Tenth Circuit's determination is now the subject of this Court's review.

SUMMARY OF THE ARGUMENT

Considerations of federalism require that the federal antitrust laws not apply to state action or official action directed by a state. As this Court recognized in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a state mandate for the anticompetitive activities of cities exists when it is found from the authority given such entities to operate in a particular area that the legislature contemplated the kind of action complained of. Colorado's grant of complete self-government to its home rule municipalities with respect to local and municipal matters provides an adequate state mandate to shield its cable television moratorium from antitrust scrutiny.

Petitioner's blanket assertions that only the state can originate anticompetitive policy and that the state must actively supervise the consequences of such policy in order for state action immunity to exist is contravened by this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* clearly demonstrates that the broad constitutional grant of authority by Colorado to Boulder makes that home rule city "the ultimate body wielding the State's power" over local and municipal matters and thus enables it to properly assert a state action defense in this case.

The suggestion that *City of Lafayette* makes municipal antitrust immunity dependent upon a specific state delegation of authority and active state supervision of each of the thousands of municipal activities that have competitive consequences will unreasonably impinge upon the sovereignty of states and their cities and threaten the proper allocation of governmental authority. It is simply unrealistic to assume that states have the resources, expertise or interest to immerse themselves in the variety of activities engaged in by their subdivisions. Moreover, such a rule would likely hamper a state's ability to concentrate its attention

[13] 630 F.2d at 704.

and resources on matters of statewide concern while, at the same time, encourage unsatisfactory uniform, centralized state planning and regulation rather than vital and long-valued local self-government. The rigid constraints which petitioners would impose on municipal government in the name of *City of Lafayette* would subvert the very full and meaningful sovereignty of state and local governments which this Court has found guaranteed by the principles of federalism.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), principles of federalism as well as Tenth Amendment limitations were considered to militate against Congress' imposing on local governments national choices as to how essential decisions regarding the conduct of governmental activities are to be made. *Usery* suggests that competitive choices embodied in the federal antitrust laws cannot be imposed on cities or states to the extent they threaten the allocation of governmental power between state and local governments.

In sum, the Tenth Circuit's decision strikes the necessary balance between constitutional principles of federalism and the congressional desire to establish competition as the guiding principle governing commerce. State action immunity, as the Tenth Circuit recognized below, may flow from the local government's possession of authority from the state to act as sovereign and, when acting in that capacity, to express the clear and articulate rationale for its policy as well as to supervise this conduct. Because the Circuit Court's decision in this case faithfully adheres to these principles, it should be affirmed.

ARGUMENT

COLORADO'S DELEGATION TO THE CITY OF BOULDER OF COMPLETE AUTHORITY TO GOVERN AND REGULATE MATTERS OF LOCAL CONCERN CONFERRED ON BOULDER THE SAME IMMUNITY FROM ANTITRUST ATTACK THAT THE STATE WOULD HAVE POSSESSED IF IT HAD IMPOSED THE REGULATIONS IN QUESTION RATHER THAN DELEGATING THAT POWER TO BOULDER.

In reaching its decision in this case, the Tenth Circuit applied the standards enunciated by this Court in *California Retail Liquor*

Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)[1] to the City of Boulder's conduct and, finding that Boulder satisfied those standards, concluded that the Sherman Act was not applicable to Boulder by virtue of the "state action" doctrine. Petitioner does not argue that the Tenth Circuit misapplied the *Midcal* standards. In other words, there is no argument that if Colorado, rather than the City of Boulder, engaged in the challenged conduct, the Tenth Circuit's decision would be wrong. Rather, petitioner contends that *Midcal's* state action standards can never be satisfied by the policy or conduct of a municipality. This is because under petitioner's view a municipality or other political subdivision may never originate an anticompetitive policy, even when it has been granted complete authority to establish substantive law and policy on a State's behalf.[2] As demonstrated below, nothing in this Court's decision in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) or any other decision of this Court supports such an assertion which would so obviously hamper the effective allocation and exercise of state and local governmental powers.

---

[1] 445 U.S. 97 (1980). The Court held that two standards needed to be satisfied for antitrust immunity under *Parker* v. *Brown*. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Id.* at 105.

[2] Petitioner argues that its interpretation of *City of Lafayette*, which requires cities to obtain specific approval by the state legislature before adopting any anticompetitive policy, will not impair the autonomy of local governments because "only states can originate anticompetitive policy; and, they are not allowed to do so because their policies are better, but because only states have the type of sovereign status which triggers Federal deference in the *Parker* sense."Petitioner's Brief, p. 42 (footnote omitted).

I. THE TENTH CIRCUIT'S HOLDING THAT BOULDER'S ORDINANCE IMPOSING A TEMPORARY MORATORIUM ON CABLE TELEVISION CONSTRUCTION WAS NOT SUBJECT TO ANTITRUST ATTACK UNDER THE STATE ACTION DOCTRINE IS CONSISTENT WITH THE *CITY OF LAFAYETTE* DECISION AND OTHER APPLICABLE PRECEDENT.

A. The Purpose Of The Sherman Act Was To Prohibit Individual And Corporate Efforts To Restrain Trade And To Monopolize; It Did Not Undertake To Prohibit Restraints Imposed As A Result Of State Action.

Parker v. *Brown*, 317 U.S. 341 (1943),[3] the Supreme Court decision formulating the doctrine of state action, involved an antitrust challenge to a California statute that authorized the establishment of an agricultural program for the marketing of raisins produced in the state. The clear effect of the program was to restrict competition among raisin growers and to fix the price of raisins in the state. Assuming that the program would have violated the Sherman Act if established by private parties, the Court nevertheless held that Congress never intended the Sherman Act "to restrain state action or official action directed by a state." *Id.* at 351. Rather, "its purpose was to suppress combinations and attempts to monopolize by individuals and corporations. . . ." *Id.* Hence, the agricultural program did not violate the antitrust laws because "the state made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

It is clear that *Parker* v. *Brown* was not intended to establish absolute immunity for all possible actions by states from the Court's remark that the case presented "no question of a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at

---

[3] The principles applied in *Parker* had been articulated in two earlier cases, *Olsen* v. *Smith*, 195 U.S. 332 (1904) and *Lowenstein* v. *Evans*, 69 F. Supp. 908 (D.S.C. 1895), which recognized both state authority to act in an anticompetitive manner and state authority to regulate economic activity in an anticompetitive manner.

351-52.[4] At the same time, the phrases "state action or official state action directed by a state" and "a state or municipality" suggest that the Court properly assumed that the same official state actions that must be immunized from antitrust attack may also be undertaken, as a matter of political reality, by local governments at the direction of their states. These local governmental acts require similar immunity if the purposes of federalism are to be served.[5]

B. In *City Of Lafayette*, The Court Held That Under The State Action Doctrine An Entity's Status As A Municipality Did Not Automatically Entitle It To The Same Protection As A State But That An Adequate State Mandate For The Anticompetitive Activities Of A Municipality Existed When Its Authority To Operate In Particular Areas Contemplated The Kind Of Anticompetitive Action Which Was Taken.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, the Court considered whether the "state action" doctrine announced in *Parker* v. *Brown* applied to cities in the same manner that it does to states. Petitioners, two Louisiana cities, contended that a private utility's antitrust counterclaim against them should be dismissed because, as cities, they were state subdivisions exercising powers delegated by the State.[6] Accordingly,

[4] The Court thus indicated that certain categories of conduct would violate the antitrust laws whether they are engaged in by states or their subdivisions. *See* note 27 *infra*.

[5] Any deference to state sovereignty is illusory to the extent that it precludes a state from unequivocally electing to entrust to its subdivisions the power to make affirmative choices against competition in the course of administering law and furnishing services within their boundaries. Such a limitation on the kinds of purposes states may have in delegating to their subdivisions the authority to act in restraint of trade belies an acceptance of "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." 317 U.S. at 351.

[6] Petitioner's reliance upon their status as cities led both the Court and respondents to characterize this argument as an assertion that all state agencies or subdivisions of a State are automatically exempt from the antitrust laws by reason of their status as such.

they argued that *Parker's* findings regarding the scope of the Sherman Act applied to them with the same force as it did to the State. *See* 435 U.S. at 394. A plurality of the Court rejected this proposition but clearly recognized that "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits" and, accordingly, "that actions of municipalities may reflect state policy." 435 U.S.at 413.[7] The plurality opinion contains slightly varying formulations as to when such municipal action would constitute state action and thus, fall within the *Parker* doctrine. Essentially, however, the plurality's thesis can be stated as follows:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. . . . This does not mean, however, that a political subdivision necessarily must be able to point to a specific detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the

---

See, e.g., 435 U.S. at 408. Such an assertion was an obvious overstatement, however, since not even states enjoy a "blanket exemption" from the antitrust laws. *See, e.g., Parker* v. *Brown*, 317 U.S. at 351. Unfortunately, however, the analysis of this issue deflected the Court's focus to some extent from the important issue whether *Parker* logically protects cities to the same extent as states. Petitioner's claim here that the Tenth Circuit's decision will bestow "blanket antitrust immunity" upon thousands of municipalities is even further exaggerated and similarly irrelevant to determining under what circumstances state government agencies and municipalities may stand in the shoes of the state for *Parker* v. *Brown* purposes.

[7] In a concurring opinion, the Chief Justice opined that the case was controlled by the fact that the challenged activity was a purely proprietary, business activity which Congress could not have intended to exempt from antitrust scrutiny. *See* 435 U.S. at 417-422.

kind of action complained of." 435 U.S. at 413-15.[8]

The primary issue before this Court is whether the Tenth Circuit was correct in deciding that the home rule authority granted to the City of Boulder in local and municipal matters meets the standards formulated in the *City of Lafayette* decision. The National League of Cities as *amicus curiae* submits that the decision of the Tenth Circuit is completely consistent with *City of Lafayette* and that Petitioner's interpretation of *City of Lafayette* creates unattainable standards which seriously jeopardize the effective allocation and exercise of state and local government power.

C. The Tenth Circuit's Decision Accords With The *City Of Lafayette* Decision And Other Supreme Court Precedent.

The Tenth Circuit's holding that Petitioner's antitrust claim was not redressable against the City of Boulder was based upon a determination that the City was exercising Colorado's ultimate sovereign authority when it engaged in the challenged conduct. Quoting the lower court, the Tenth Circuit stated:

> If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about. 630 F.2d at 707.

The Tenth Circuit held initially that such a complete grant of authority was "an adequate state mandate" for the allegedly anticompetitive activities. Then, the court applied the standards enunciated in *Midcal* to the City's challenged regulation as if the State had itself imposed this regulation. The Tenth Circuit also

---

[8] *See Cedar-Riverside Associates, Inc.* v. *United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978).

appropriately distinguished *City of Lafayette* from this case. The analysis employed by the Tenth Circuit is unquestionably correct.

1. Colorado's grant of total self-government to its home rule cities with respect to local and municipal matters provides an adequate state mandate for any local and municipal activities that may be anticompetitive.

In this case, Colorado, through its constitutional home rule provisions, granted the City of Boulder the complete right of self-government in local and municipal matters. The State further provided that ordinances passed by Boulder would supersede any inconsistent statutes of the State of Colorado. This comprehensive grant of the State's governing powers to home rule cities with respect to their local affairs virtually compels the inference that the drafters of the Colorado Constitution "contemplated" the possibility that some of the acts of self-government pursued by home rule cities would be anticompetitive.[9] Although Petitioner argues that there is no evidence to indicate that the State in fact contemplated any restraint of cable television construction by its home rule cities, such a stringent standard is not required under *City of Lafayette*. The plurality there expressly "stated that a political subdivision need not point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit." 435 U.S. at 415.

Moreover, this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), clearly indicates that the very broad constitutional grant of authority by Colorado to Boulder enables the City to assert a *Parker* defense to the same degree as if it were

---

[9] This can be seen by the number of traditional local governmental functions that cities ordinarily could be expected to assume under such a grant of authority which have anticompetitive consequences. *See* notes 19-21 *infra* and accompanying text.

The fact that the state Attorneys General of Colorado and numerous other states implicitly urge that this was not the case should not be given much credence in light of the historical dispute between cities and states over home rule and Colorado's failure to provide that its own antitrust laws would be applicable to such conduct.

the State. In *Bates*, the Court considered whether the Arizona State Bar's enforcement of a ban against lawyer advertising violated the antitrust laws. The Court upheld the validity of the ban, observing that the challenged restraint was the "affirmative command of the Arizona Supreme Court" which was, according to the state constitution, "the ultimate body wielding the State's power over the practice of law." 433 U.S. at 360. Accordingly, the Court concluded that the restraint was "compelled by the direction of the State acting as sovereign" (*id.*), even though the particular constitutional provision neither addressed nor alluded to specific court power to impose anticompetitive restraints or prohibitions on legal advertising. The Court also observed that the state's anticompetitive policy was "clearly and affirmatively expressed" in the Arizona Supreme Court's disciplinary rules and that it was actively supervised and subject to "re-examination by the policy-maker — the Arizona Supreme Court — in enforcement proceedings," thus reducing the possibility that "federal policy was being unnecessarily and inappropriately subordinated to state policy."[10]

The striking parallels between the Court's analysis in *Bates* and the Tenth Circuit's decision below confirm the validity of the latter court's analysis. Colorado's Constitution has rendered the City of Boulder "the ultimate body wielding the State's power"

---

[10] 433 U.S. at 362. The Court contrasted these facts with the circumstances in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Indeed, even *Goldfarb* and *Cantor* implicitly demonstrate that the state policy essential to the state action shield may be found not only in state legislation and constitutional provisions, but in rules and regulations reflecting policy adopted by a governmental entity exercising a constitutional or legislative grant of authority to regulate in a particular area. Thus, the failing with *Goldfarb* was not that the Virginia Supreme Court did not have the state's authority to impose an anticompetitive restraint, but rather that it did not exercise it. Similarly, in *Cantor*, the State Public Service Commission's approval of a tariff incorporating the challenged light bulb exchange program was not deemed to be a clear and affirmative expression of anticompetitive policy since, if such a program were invalidated, it would not have impaired the state's regulatory interests in the least. 428 U.S. at 579.

over all of Boulder's local and municipal affairs. Accordingly, as was so in *Bates*, the restraint imposed by Boulder should be deemed to be "compelled by direction of the state acting as sovereign," notwithstanding the absence of a particular constitutional provision alluding to the power of Boulder to make anticompetitive policies or to impose moratoriums on cable television franchises operating within its borders. Similarly, as was true of the Arizona Supreme Court, the ordinances and conduct of Boulder reflect a clear expression of the anticompetitive policy at issue, and as the policy-maker, Boulder actively supervised and reexamined that policy by virtue of the imposition of a 90-day moratorium and the issuance of civil and criminal citations to cable workers when the moratorium was ignored.[11] In short, Petitioner's blanket assertions that "only the state [and not a city or other political subdivision] can originate anticompetitive policy"[12] and that active supervision must come from the state not from the entity delegated with the state's policy-making authority[13] are contravened by *Bates*.

2. This is a different case than *City of Lafayette*, and the concerns articulated in that decision are not at issue here.

The argument that the Tenth Circuit's decision contravenes this Court's decision in *City of Lafayette* not only misreads *City of Lafayette* but ignores critical distinctions between that case and this one.

Petitioner implicitly reads the *City of Lafayette* decision as establishing that the cities' conduct at issue there was unprotected by the state action doctrine. In fact, the Court remanded the case to the District Court for an examination of the intent and effect of

[11] *See* 630 F. at 708; *see also Glenwillow Landfill* v. *City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979). In *Glenwillow*, the court rejected, on the authority of *Bates*, a challenge to a waste disposal program implemented by an Ohio home rule city. The court gave deference to the Ohio constitutional grant to cities of the power to declare the waste disposal policy that would operate within their borders.

[12] Brief for Petitioners, p. 42.

[13] *See* Petition for Writ of Certiorari, p. 9.

the Louisiana's grant of authority to the cities in order to decide whether their conduct was protected. Even assuming that the actions challenged in *City of Lafayette* would have been found to have been subject to antitrust scrutiny, however, the facts of the instant case are significantly different and clearly justify a different result.

In the first place, the grant of authority by the Louisiana legislature to the cities of Lafayette and Placquemine to own and operate electric utility systems within and beyond city limits is far more circumscribed than the constitutional grant of self-government over all local and municipal matters made by Colorado to Boulder. Second, Boulder's grant of authority provides that its city ordinances will override contrary state statutes (including the state antitrust laws). In contrast, the state statutes examined in *City of Lafayette* specifically provide that municipalities shall be subject to the antitrust laws of the United States and in no way indicate that state antitrust laws will be superseded. Third, unlike Placquemine and Lafayette, Boulder was not an owner or provider of the cable television services which it sought to regulate. Finally, whatever the alleged anticompetitive effects of Boulder's regulation may have been, they were focused on conduct within the City of Boulder itself. Accordingly, the concerns of the *City of Lafayette* Court that cities should not be given license to make economic choices counseled solely by their own "parochial interests" and without regard to their anticompetitive effects on non-constituents are not in issue here. *See* 435 U.S. at 404, 408 and 412-13.

Petitioner argues that the state action doctrine has been greatly narrowed since *Parker* and that cities now bear an extremely heavy burden of proving their entitlement to state action immunity after the *City of Lafayette* decision. If the *Parker* doctrine has been narrowed, however, it has not been retrenched in a way that would leave Boulder's governmental actions outside its perimeter. All that is clear since *City of Lafayette* is that cities acting as competitors in a market setting are not automatically protected as state actors. Each of the plurality's references to Congress' design to apply the Sherman Act to "every person engaged in *business* whose activities might restrain or monopolize *com-*

mercial intercourse among the states"[14] must be understood in the context of that case. The municipalities there were arguably engaged in business or commerce in running city utility companies in rivalry with privately-owned companies. There is no justifiable basis for expanding this language that is closely keyed to "commerce," "business" and "business affairs" to cover all the activities engaged in by a municipality in the course of the exercise of its governmental functions.[15]

Indeed, the Court's statements that its *City of Lafayette* decision does not "impair the ability of a state to delegate government power broadly to its municipalities" (435 U.S. at 416) or "threaten the legitimate exercise of government power" (*id.*) would be seriously undercut if Petitioners' contentions were accepted. As is described in the next section, any requirement that the state expressly approve and then supervise all regulations and ordinances of cities that have possible anticompetitive consequences would be the antithesis of home rule authority and would force state involvement with the daily operation of such traditionally local matters as zoning, licensing and franchising. This would of course be unworkable. Thus, it is the position of the National League of Cities that the analysis of the Tenth Circuit's decision below is eminently sensible and consistent with *City of Lafayette* and that it should therefore be affirmed.

---

[14] 435 U.S. at 398-99. (Emphasis added) The Court observed that Congress, exercising "the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing *commerce* in this Country." (Emphasis added) *Id.* It later stated that "Congress mandated competition as the polestar by which all must be guided in ordering their *business affairs.*" 435 U.S. at 406. (Emphasis added)

[15] Finally, the *City of Lafayette* plurality determined to consider the cities' state action arguments "in light of the presumption against implied exclusion from coverage of the antirust laws" may have been appropriate in the context of the commercial activities involved in that case. But, the Court established in *Parker* v. *Brown* that Congress never intended the Sherman Act to apply to governmental actions. This fact substantially weakens any argument in this case that "repeal" of the antitrust laws must be undertaken with caution. *See generally,* Handler, "The Current Attack on the *Parker* v. *Brown* State Action Doctrine," 76 Colum. L. Rev. 1, 9 (1976).

II. PETITIONER'S INTERPRETATION OF *CITY OF LAFAYETTE* WOULD CRITICALLY IMPAIR THE ABILITY OF MUNICIPALITIES TO GOVERN AND SHOULD BE REJECTED.

In attacking the decision of the Tenth Circuit Court of Appeals below, Petitioner and the state *amici* contend that *City of Lafayette* precludes antitrust immunity for the regulatory action undertaken by the City of Boulder for the reason that implied exemptions from the antitrust laws must be narrowly construed. They argue that federal deference to states as sovereign powers does not require extension of state action immunity to the political subdivisions or agents of states. As a result, they urge that the legitimate governmental decisions and regulatory activities of municipalities and other local governments should be subject to the antitrust laws unless the state itself makes a specific decision to displace competition in a given market on the basis of a clearly articulated state policy, and the state itself further supervises any municipal conduct taken pursuant to such a state policy. Because these standards are completely inconsistent with the principle of home rule authority and because their adoption would frustrate the reasonable allocation and exercise of state and local government powers, they should be rejected.

A. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And The State *Amici* Are Inconsistent With The Concept Of Home Rule And Represent An Improper Effort By Those Parties To Repeal The Constitutional Grant Of Self-Government To Municipalities.

In its constitutional home rule provisions, Colorado granted its municipalities "the full right of self-government" with respect to all local and municipal matters. By now contending that this complete grant of self-government does not confer municipalities like Boulder with the same right as the State to govern without having each and every governmental act subject to antitrust challenge, Colorado and the other state *amici* are attempting improperly to repeal the constitutional right of municipal self-government.

Petitioner's and the state *amici's* interpretation of *City of Lafayette* offers a Hobson's choice to home rule municipalities. Under their view of this decision, all municipal conduct will be subject to antitrust scrutiny unless the state specifically formulates and then supervises any course of conduct that may have anticompetitive effects. Yet, state involvement in municipal affairs is the antithesis of home rule government. Because Colorado's constitutional provisions grant home rule municipalities "the full right of self government" with respect to local matters, the state has divested all of its authority in these affairs. Thus, home rule municipalities could never meet the state action standards proposed by Petitioner unless they relinquished their right to autonomy. On the other hand, having each municipal law and regulation subject to antitrust scrutiny would severely hamper the ability of cities to govern.

The essence of government regulation is to impose conditions on public and private conduct. Accordingly, all governmental regulation can be said to restrain trade to some degree. While some restraints may be able to withstand traditional antitrust scrutiny, other governmental acts serving important public interests will not be able to meet this test.[16] It does not follow that such governmental action should be automatically invalidated. Moreover, the fact that, under the view of Petitioner and state *amici*, each municipal regulation will have to be reviewed under a protracted rule of reason analysis and be subject to a possible treble damage award, itself will serve to cripple the operation of home rule municipalities.[17] For these reasons, this view must be rejected. If the states whose attorneys general have appeared as

[16] *See* notes 19-21 *infra* and accompanying text.

[17] As the Court observed in the context of a decision which could have greatly expanded the scope of securities litigation under Rule 10(b)(5), "even a complaint which by objective standards may have very little chance of success at trial has a . . . value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate and delay normal . . . activity of the defendant which is totally unrelated to the lawsuit. *Bluechip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975). *See also Gen. Commun. Eng.* v. *Motorola Commun. & Electronics*, 421 F. Supp. 274, 290, n.37

amici curiae truly desire to repeal or otherwise cut-back the scope of the home rule authority that they granted to their municipalities, they may do so directly through appropriate legislative enactments or amendments of their state constitutions.[18]

B. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And State *Amici* Unreasonably Impinge Upon The Sovereignty Of States And Their Cities And Threaten The Effective Operation Of State And Local Governments.

States are afforded wide latitude in creating political subdivisions for the allocation of governmental power. *Holt Civic Club*

(N.D. Cal. 1976). "[T]he very ability to impose on competitors the heavy burden of antitrust litigation over claims that cannot be dismissed at the outset is dangerously anticompetitive in itself."

[18] That the state attorneys general would advocate such an unreasonable position is surprising and can only be understood in the context of the historical and periodic disagreement between states and cities over the appropriate balance of their respective powers.

Before the Revolution, cities were supreme in their exercise of local power including extensive authority over trade, citizenship and the right to engage in or regulate private businesses. "Historically, Americans have strongly believed . . . in the idea of local self-government," L. Gulick, *The Metropolitan Problem and American Ideas* 45 (1962). After the Revolution, states asserted nearly complete sovereignty over cities, J. Mileur, "Municipal Home Rule in the United States," in *Home Rule* 9 (E. Gere & M. Curran ed. 1970).

The balance of power has shifted back toward cities over time. In the nineteenth century, when cities swelled with immigrants, local affairs were still controlled by rural-dominated legislatures which all too often engaged in "raw political manipulation of local affairs," L. Gulick, *supra* at 46. These state abuses led to home rule agitation by cities which gained momentum in the direct democracy Populist movement for good government of the early twentieth century. This coalition of urban and Populist interests managed to mobilize popular opinion to wrest power from the states in order to protect cities, J. Mileur, *supra* at 12. Home rule, guaranteeing local self-government on matters of local concern, was the result.

v. *City of Tuscaloosa,* 439 U.S. 60, 71 (1978); *Sailors* v. *Board of Education,* 387 U.S. 105, 108 (1967). This flexibility is essential because the genius of local government is experimentation. As the Supreme Court said in *Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980), any other result

> would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. A healthy regard for federalism and good government renders us reluctant to risk these results.

The Petitioners argue that *City of Lafayette* requires 1) a specific state delegation of authority for each municipal activity with anticompetitive consequences and 2) active supervision by the State itself of the particular municipal conduct in order for immunity to attach. Such an interpretation would substantially impair the ability of local governments and states to conduct important governmental affairs. Local governments engage in a wide variety of activities including zoning, land-use planning, occupational licensing and regulation, franchising, operation of municipal facilities, provision of health services, provision of utility services, transportation, housing, refuse collection and urban development. All of these activities can have competitive consequences.

If Petitioner's view were adopted and municipal government regulation were exposed across the boards to antitrust attack, the results would be staggering to municipalities and injurious to the public.[19] There are a number of useful examples. A city might

[19] City governments perform a variety of public services which account for one out of every five dollars spent by all state and local governments. This amount equals nearly one-fifth of total federal expenditures exclusive of national defense and international affairs. Of the $65.6 billion spent by city governments in the fiscal year 1978-79, $7.5 billion went to police protection and $4.1 billion to fire protection. Other city expenditures included $4.6 billion for sewage systems, $2.4 billion for sanitation, $3.2 billion for parks, $5.3 billion for water supplies and $9.9 billion on other utilities like gas and electric power. In addition, cities spent $5.3 billion on roads, $2.9 billion on hospitals, $0.8 billion for libraries and $8.4

determine that traffic and other considerations dictate that one taxi company or a limited number of taxis make runs from the city's airport and decide in conjunction to fix maximum taxi fares to prevent price gouging. Although such conduct serves legitimate governmental interests, under conventional antitrust analysis, it would constitute a *per se* violation of the antitrust laws.[20] Similarly, occupational licensing by municipalities is designed to minimize health, safety and nuisance threats to city residents, but this regulation necessarily restrains the trade of those engaged in these activities and creates barriers to market entry.[21] Cities establish local historic preservation areas in which they strictly control the kind and number of business enterprises and the structure, capacity and hours of operation of business facilities. These areas are intended to preserve heritage and promote environmental conditions. The commercial freedom of businesses located therein is consciously sacrificed to serve these interests. A city may provide a service, like bus transportation, on a monopoly basis to assure availability and minimum performance. This practice in-

---

billion for education. Bureau of the Census, U.S. Department of Commerce, GF 79 No. 4, *City Government Finances in 1978-79* at 10 (1980). *Economic Report of the President,* 315, 321 (1981).

Of the 75 "major" services performed by California cities in 1974, half were mandated by state law. County Supervisors Associations of California, *Catalog of Public Services and Functions* (1974).

[20] *See, e.g.,* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

[21] In one major home rule city, Columbus, Ohio, the City Council has promulgated a large number of businesses and professional codes for regulation of astrologers, auctioneers, bondsmen, itinerant wholesale produce dealers, peddlers, solicitors, pawnbrokers, secondhand dealers generally, secondhand motor vehicle dealers, wholesale produce dealers, operators of dances, dancehalls, public amusements, shows, circuses, exhibition of objects of curiosity, public utility companies, taxicabs, community antenna television systems, garbage collection, testing and sealing measuring devices, sale of ice, fruit, vegetables, berries, petroleum products and home improvement contractors. *See Columbus City Codes, passim.*

evitably excludes private competitors from the market. A governmental unit frequently will require private purveyors of essential utilities like water or electricity to serve the entire city or to serve it in a particular manner in order to guarantee that the needs of all segments of the population will be accommodated. This requirement may well contravene the private companies' pure commercial interests.

Because each of the foregoing courses of conduct promotes some other concern at the expense of a pure free-market environment, each could be subject to antitrust attack. Under Petitioner's reading of *City of Lafayette*, the only way these kinds of traditional local governmental activities would be immunized would be for the perpetrators to be able to point first, to a specific and clear state policy to displace competition with respect to a particular municipal activity and then, to obvious active state supervision of the activity questioned.

The fallacy of this approach is that it would be impossible for cities to obtain from their state legislatures on an individual basis specific approval for each of the myriad of policy choices and administrative decisions they make in the course of self-government that have attendant effects on competition. Even if the Petitioner's requirement were interpreted less strictly to call only for approval by the categories of municipal regulatory activities, the sheer volume of necessary legislative participation in local affairs would be enormous. It is simply unrealistic to assume that state legislatures have the resources, expertise or interest to immerse themselves in the variety of activities engaged in by their subdivisions.

Petitioner's analysis of *City of Lafayette* also would seriously impair the ability of states to delegate authority to local government. The decentralization of state power has left state governments free to devote attention and resources to matters of statewide concern, broadly delegating power to local authorities with the interest and expertise to deal quickly and flexibly with local problems. Citizen participation in local problem solving has been fostered. Yet, Petitioner's interpretation of *City of Lafayette*

"corner[s] cities into a rigid and narrow nineteenth century dependence upon the state."[22]

In addition, even if the states were willing to undertake the substantial cost and burden to develop the pervasive policy guidelines necessary to satisfy the Petitioner's proposed criteria, the likely result would be a uniformity of State policy rather than vital and long appreciated local experimentation. In reviewing the exercise of state power, moreover, courts might well be obliged to second-guess each of the substantive government decisions to replace competition with regulation or monopoly service.[23] What criteria the courts would employ in making such substantive determinations is unclear but would be likely to further stifle local government, initiative and experimentation. In sum, the full and meaningful sovereignty which federalism guarantees state and local government would be subverted if the rigid constraints which Petitioners would impose on municipal government in the name of *City of Lafayette* are not rejected.

In this regard, this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) is of special significance. In *Usery,* this Court held that Congress lacked the power to reach and control the employment conditions of state and local governments through the Fair Labor Standards Act[24] noting that the

---

[22] Freilich, Growock & Ungar, "1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs," 10 Urb. L. 573, 604-05 (1978).

[23] *See Fergerson* v. *Sherupa,* 372 U.S. 726, 730 (1963) (courts should not "sit as a superlegislature to weigh the wisdom of legislation).

[24] More specifically, the Court upheld a challenge to minimum wage and hour requirements which Congress sought to impose on state and local governments through amendments to the Fair Labor Standards Act. This legislation, as it was originally enacted in 1938, applied only to private employers. Employees of the United States, the several states and political subdivisions of the states were excluded from coverage. The Act was amended in 1961 to include certain public employees working in "enterprises engaged in commerce or in the production of goods for commerce," and again in 1971 to bring employees of state hospitals, institutions and schools within its coverage. The constitutionality of these amendments was sustained in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Finally, the Act was

Tenth Amendment prevents Congress from "exercis[ing] power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system."[25]

The Court specifically considered the impact of the amendments on the performance by state and local governments in discharging their dual functions of administering public law and furnishing public services and concluded that even if the federal requirements might be socially desirable, they might "substantially restructure the ways in which the local governments have arranged their affairs." 426 U.S. at 833. For that reason, the Court concluded:

> This exercise of congressional authority does not compare with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]. 426 U.S. at 852.

The Court thus recognized that principles of federalism as well as Tenth Amendment limitations militate against Congress' imposing on local governments "its choices as to how essential decisions

---

amended in 1974 to define the term "employer" to include a "public agency" employing persons "handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce." By these amendments, Congress acting under the Commerce Clause sought to remove the exemption that had existed for state and local employees.

[25] 426 U.S. at 833 (quoting *Fry* v. *United States*, 421 U.S. 542, 547, n.7). Recognizing a Commerce Clause power in Congress to preempt state regulation of the private sector, the Court nevertheless stated:

> It is quite another [matter] to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. 426 U.S. at 845.

regarding the conduct of integral governmental functions are made." Moreover, the opinion clearly addressed the unwisdom of congressional interference not only with states but also with cities:

> The local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if the services were provided by the State itself. 426 U.S. at 855, n.20.

The language and rationale of the *Usery* decision squarely countermand the interpretation of *City of Lafayette* offered by Petitioner and the state *amici*. Indeed, *Usery* means that the competitive choices embodied in the federal antitrust laws cannot be imposed upon cities or states to the extent that they interfere with the conduct of integral government affairs. Accordingly, it would be illogical and unnecessary to interpret the *City of Lafayette* decision as calling for this degree of intrusion.

III. The Tenth Circuit's Decision Strikes The Proper Balance Between Constitutional Principles Of Federalism And The Congressional Desire To Establish Competition As The Guiding Principle Governing Commerce By Neither Impairing The Abilities Of States And Cities To Allocate And Exercise Government Power Nor Providing Those Entities With A License To Violate The Antitrust Laws With Impunity.

The analysis utilized by the Tenth Circuit below and urged by NLC in this brief suggests that the state action defense of a state subdivision should be conditioned on satisfaction of two standards: (1) that the governmental entity possess the authority of the state to act as sovereign and (2) that in acting in this capacity, the governmental entity clearly articulate and affirmatively express the policy underlying its conduct, as well as actively supervise this conduct.

Here, there is no dispute that Boulder satisfied the second standard. The issue is whether Colorado's grant to Boulder of the full right of self-government with respect to local and municipal

matters (including the right to supersede contrary state statutes) is sufficient to imbue Boulder with the state's sovereign authority with respect to such affairs as the construction of a cable television network within Boulder's borders. Petitioner's contention that Boulder's home rule authority does not make it sovereign is based on its view that cities and other political subdivisions lack the power "to originate" anticompetitive policies even where the state has delegated them complete authority to make policy with respect to particular matters. Petitioner apparently believes that while a state can delegate the authority to establish policy to a government agency or political subdivision, the policy established cannot have anticompetitive effects unless the state has specifically approved it. As argued earlier, such a system would be completely unworkable. It would subject virtually all local governmental policy and regulation to antitrust scrutiny, and regulatory systems and policies long considered appropriate would be invalidated.

Petitioner argues on the other hand, that if the Tenth Circuit's decision is affirmed, thousands of home rule cities will be given blanket immunity to violate the federal antitrust laws and to engage in predatory conduct with devastating state-wide and possibly national effects whenever their parochial interests so dictate. Such a result in no way will follow from an affirmance of the Tenth Circuit's decision and analysis.

In the first place, the antitrust immunity of cities will be no broader than that of states which do not have blanket antitrust immunity.[26]

[26] As the Supreme Court recognized, the State may not authorize private parties to violate the federal antitrust laws, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), nor shield private conduct by reason of state involvement, *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Where the State conspires to restrain or monopolize trade, the antitrust laws may reach and proscribe its conduct. *Id.* 587-89. States are "persons" for purposes of the antitrust laws and may sue or be sued under them, *Georgia* v. *Evans*, 316 U.S. 159 (1942). Nothing in their status as states precludes such a result. *See Union Pacific R. R.* v. *United States*, 313 U.S. 450 (1941); *Jordan* v. *Mills*, 473 F. Supp. 13 (E.D. Mich. 1979) (class action by prison inmate regarding price fix-

Second, to be able to assert a *Parker* defense, cities will require the explicit or implicit authority from the State to act as sovereign with respect to particular matters. Here, Colorado's grant of home rule autonomy has conferred such authority.[27] The home rule provisions of other states may confer far less authority[28] and consequently provide a narrower basis for antitrust immunity. Moreover, even Colorado has the power to rescind its broad grant of authority through appropriate constitutional means.

---

ing, conspiracy and monopolistic practices at state-run prison store); *Reid* v. *University of Minnesota,* 107 F. Supp. 439 (N.D Ohio 1952) (sales of books by state university press challenged under the price discrimination provisions of the Robinson-Patman Act). *Cf. Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980). In *Reeves,* the Court rejected a burden on interstate commerce challenge to the refusal of the State of South Dakota to sell cement manufactured in its state-owned and operated facility to out-of-state customers during a time of shortage. The Court said:

> state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. 447 U.S. at 439.

In reaching its decision, the Court found controlling traditional antitrust principles including:

> the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. 447 U.S. at 438-39. (quoting *United States* v. *Colgate & Co.,* 250 U.S. at 300, 307 (1919).

[27] Even here, however, Colorado did not intend to make its home rule cities sovereign with respect to matters which were not essentially local. Hence, if Boulder's ordinances had restrained trade outside its own territorial limits, this matter would not be local, and Boulder's conduct would not be subject to a *Parker* defense.

Indeed, only six states authorize cities to act on state-wide matters and only then in the absence of a state prohibition or preemption. *See* chart in Appendix to Petitioners' Brief. Thus, the fears of the state *amici* and Petitioners that the Tenth Circuit's decision contravenes the policies expressed in *City of Lafayette* are greatly exaggerated.

[28] For example, in the 27 states whose grants of municipal authority do not expressly provide that a city's ordinances shall

Third, cities must clearly articulate and affirmatively express the policy underlying any anticompetitive restraint that is imposed and actively supervise or re-examine such policy on a regular basis. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

Finally, and most importantly, these standards need not be interpreted or applied mechanically or inflexibly without regard to the particular anticompetitive policy or conduct adopted. Inherent in the requirement that the policy underlying a particular governmentally-imposed restraint of competition be "clearly articulated and affirmatively expressed" is the principle that the restraint must bear a rational relationship to, and, in some circumstances, be no broader than necessary to achieve a legitimate governmental interest.[29] Accordingly, it would be a rare instance in which the state action doctrine would protect truly predatory behavior.

Application of the standards proposed above need not ignore the fact that a city or a state may be acting in a proprietary rather than a governmental capacity and that it may be motivated by interests which appear to be more "private" than "public." Although the proprietary/governmental distinction may not always be clear-cut, where it is,[30] the engagement in proprietary

---

supersede contrary state statutes and where such states have expressed a policy through statutory or regulatory means which is inconsistent with that adopted by a municipality, it would be fair to infer that the municipality may not have been intended or contemplated to act as sovereign with respect to such matters.

[29] Thus, in *Bates, supra,* the Court explained that the state's clear and affirmative expression of the policy behind its challenged restraint along with its active supervision reduced the Court's concern that federal policy was unnecessarily and inappropriately being subordinated to state policy. It would appear that implicit in this statement is the premise that the state policy be a rational one in furtherance of a legitimate government goal, for if this were not so, the Court's concern would hardly be reduced.

[30] *See Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980). (Holding that policy imposed by South Dakota to restrict sales from its

activities should trigger close scrutiny of whether a municipality is "as sovereign, impos[ing a] restraint as an act of government. . . ."[31] On the other hand, where a political subdivision is engaging in such traditional regulatory matters as zoning, a less rigorous application of these standards might be justified.[32]

In summary, the Tenth Circuit's decision successfully accommodates the tension between important national values that was so clearly evident in *City of Lafayette* and illustrates the kind of formulation necessary to avoid promoting either fundamental interest to the absolute detriment of the other.

---

state-operated cement plant to South Dakota residents did not violate Commerce Clause since state was simply acting in a proprietary capacity.) The Court also held that in this context "the basic distinction . . . between states as market participants and states as market regulators makes good sense and sound law. *Id.* at 436. *Compare City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 433 ("The distinction between 'proprietary' and 'governmental' activities has aptly been described as a 'quagmire' [citing *Indian Towing Co., Inc.* v. *United States,* 350 U.S. 61, 65, 67-68 (1955)] (Stewart, J., dissenting).

[31] *Parker* v. *Brown,* 317 U.S. 341, 352 (1943). Indeed, *Parker's* express reference to the imposition of the restraint by the state "as an act of government" when coupled with its distinguishing of a "state or its municipality" participating in a "private agreement or combination by others for restraint of trade" (*Id.* at 351-52) would lend further support to regarding the proprietary/governmental distinction as a factor worthy of consideration.

[32] In essence, as is so in the "equal protection cases," the level of scrutiny would vary according to the type of restraint at issue. *See, e.g., Craig* v. *Boren,* 429 U.S. 190 (1976); *Reed* v. *Reed,* 404 U.S. 71 (1971).

CONCLUSION

For the foregoing reasons, the judgment of the United States Circuit Court for the Tenth Judicial Circuit should be affirmed.

Respectfully submitted,

ROSS D. DAVIS
DAVIS SIMPICH & SIENA
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 833-3640
Counsel for National League of Cities

Of Counsel:
HOWARD W. FOGT, JR.
JAY N. VARON
CATHERINE B. KLARFELD
FOLEY, LARDNER, HOLLABAUGH & JACOBS
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 862-5300